IN THE SUPREME COURT OF THE STATE OF NEVADA

ALEXANDER D. PASCO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37678

FILED

MAY 30 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

On June 6, 1997, the district court convicted appellant, pursuant to a jury verdict, of robbery with the use of a deadly weapon (count I) and burglary with the use of a deadly weapon (count II). The district court sentenced appellant to serve in the Nevada State Prison a term of forty-eight months to one hundred and twenty months, with an additional consecutive term of forty-eight months to one hundred and twenty months for the deadly weapon enhancement on count I, and twenty-six months to one hundred and twenty months, with an additional consecutive term of twenty-six months to one hundred and twenty months for the deadly weapon enhancement on count II. The sentence on count II was ordered to run concurrent to the sentence on count I. This court dismissed appellant's direct appeal.[1]

On December 6, 2000, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

[1]Pasco v. State, Docket No. 30583 (Order Dismissing Appeal, April 26, 2000).

02-09434

State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On February 22, 2000, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that his trial counsel was ineffective. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that but for counsel's errors, the result of the proceeding would have been different.[2] There is a presumption that counsel provided effective assistance unless petitioner demonstrates "'strong and convincing proof to the contrary.'"[3] Further, this court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.[4]

First, appellant contended that his trial counsel rendered ineffective assistance by failing to file a motion to suppress evidence allegedly illegally obtained. In order to establish prejudice based upon counsel's failure to file a motion to suppress evidence, appellant must show that the motion to suppress was meritorious and that there was a reasonable likelihood that the exclusion of the evidence would have changed the result of the trial.[5] Our review of the record indicates that

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[2]See Strickland v. Washington, 466 U.S. 668 (1984); Riley v. State, 110 Nev. 638, 646, 878 P.2d 272, 277-78 (1994).

[3]Davis v. State, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991) (quoting Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981)).

[4]Strickland, 466 U.S. at 687.

[5]See Kirksey v. State, 112 Nev. 980, 990, 923 P.2d 1102, 1109 (1996).

there was no legal basis to suppress the evidence. At trial, evidence was produced that police observed two black males in a speeding maroon Pontiac without its headlights on. After briefly losing sight of the vehicle for several seconds, police noticed that one of the vehicle's occupants had exited undetected. Police stopped the vehicle and upon approaching the driver and looking through the windows of the vehicle, they noticed spent shell casings and a dark stocking in plain view inside the vehicle. Police called dispatch and learned that there had been a recent robbery of the Town Pump liquor store, which was located nearby. The driver was handcuffed, and upon properly searching his person due to concern for officer safety,[6] police found $153 in cash, some of which was rubber-banded, as was the practice of the Town Pump liquor store. A subsequent search of the surrounding area revealed a nine-millimeter Glock semi-automatic pistol underneath a nearby vehicle, a discarded blue long-sleeved sweatshirt, blue "Dickie" pants with five thirty-two caliber bullets in the pockets, and a roll of duct tape. A local resident produced another handgun found in the street nearby. An inventory search of the vehicle conducted after appellant had been arrested produced a pair of gloves. We conclude that the evidence was discovered in plain view, outside appellant's vehicle in the immediate vicinity, and pursuant to a proper inventory search of appellant's vehicle subsequent to appellant's arrest.[7] Thus, we conclude that counsel was not ineffective because a motion to

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[6]See Rice v. State, 113 Nev. 425, 429, 936 P.2d 319, 321 (1997) citing Terry v. Ohio, 392 U.S. 1 (1968).

[7]See State v. Wright, 104 Nev. 521, 523, 763 P.2d 49, 50 (1988); see also Weintraub v. State, 110 Nev. 287, 288, 871 P.2d 339, 340 (1994).

suppress would not have been meritorious and would not have changed the result of the trial.

Second, appellant contended that his trial counsel rendered ineffective assistance by failing to object to or file a motion to suppress the allegedly impermissible out of court identification evidence. At trial, evidence was produced that police discovered the aforementioned evidence in appellant's vehicle, which led police to believe that appellant could be the robber of the Town Pump liquor store. Police subsequently brought the victims from the Town Pump liquor store to the scene of the vehicle stop, and they identified appellant as one of the robbers based on his attire. We conclude that in light of the totality of the circumstances, the district court did not err in denying this claim.[8] Thus, we further conclude that counsel was not ineffective because a motion to suppress would not have been meritorious and would not have changed the result of the trial.

Third, appellant contended that his trial counsel rendered ineffective assistance by failing to object to or file a motion suppress the allegedly impermissible pretrial in-court identification of appellant as the perpetrator. Specifically, appellant contended that immediately prior to the commencement of the preliminary hearing, while appellant's counsel was not present, the witnesses were escorted into the courtroom, and the escorting officer allegedly pointed to appellant, stating "thats [sic] him." Appellant further contended that counsel was informed of this occurrence when he entered the courtroom, but failed to object "to the admissibility of the identification testimony that was improperly produced." The record

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[8]See generally Bias v. State, 105 Nev. 869, 784 P.2d 963 (1989) (holding that even if identification is unduly suggestive, it can be reliable based on the totality of circumstances).

does not support appellant's claim. During the preliminary hearing, neither of the two testifying victims made an in-court identification of appellant, rather, they merely described the clothing and general appearance of the perpetrators. Further, the two arresting police officers merely testified that appellant was the same individual that they had arrested the evening of the crime. Additionally, appellant's counsel extensively cross-examined all of the witnesses at the preliminary hearing. Thus, we conclude that appellant's counsel did not render ineffective assistance by failing to object or file a motion to suppress the pretrial in-court identification because neither would have been meritorious, and the result of the proceedings would not have been different.

Fourth, appellant contended that his trial counsel rendered ineffective assistance by failing to expend sufficient time and energy to prepare a reasonable defense, and failing to interview witnesses. Appellant failed to provide sufficient facts to support this claim.[9] Appellant failed to provide the names of the witnesses his counsel allegedly should have interviewed and failed to demonstrate what specific facts these witnesses would have revealed. Thus, appellant failed to demonstrate that counsel was ineffective in this regard

Fifth, appellant contended that his trial counsel rendered ineffective assistance by failing to "negotiate a proper plea process." The sole fact that appellant provided in support of this claim is that during proceedings counsel allegedly reassured appellant about appellant's decision to go to trial by stating, "we are going to win this." Appellant appeared to contend that his counsel was ineffective because counsel failed

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[9]See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

to advise appellant of the improbability of acquittal and the potential benefit of pleading guilty and possibly receiving a reduced sentence. Plea negotiations or the lack thereof, even if unwise when viewed in hindsight, seldom support a finding of ineffective assistance of counsel.[10] Further, on October 16, 1996, appellant's counsel represented to the court that a plea agreement had been negotiated, and that appellant would enter an Alford[11] plea to the charge of robbery with the use of a deadly weapon. Appellant subsequently rejected the plea agreement and requested a trial. Thus, appellant failed to demonstrate that counsel was ineffective in this regard.

Sixth, appellant contended that his trial counsel rendered ineffective assistance by failing to adequately cross-examine and "protest the inconsistencies" in the witnesses' testimony. Specifically, appellant contended that counsel should have (1) argued that testimony given at the preliminary hearing indicated the perpetrator was wearing a "blue checkered hooded pull over [sic] jacket," but a "blue plaided shirt without a hood" was presented to the victims at trial, and (2) argued that the arresting officers gave conflicting testimony as to where the evidence was discovered in the vehicle. The record repels appellant's contentions. Appellant's counsel thoroughly cross-examined the State's witnesses at the preliminary hearing and at trial. Further, the record indicates that both victims testified at the preliminary hearing that one of the

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[10]See Larson v. State, 104 Nev. 691, 694, 766 P.2d 261, 263 (1988); see also U.S. v. Kidd, 734 F. 2d 409, 414 (9th Cir. 1984) (concluding that counsel's advice to the defendant to refuse a plea bargain, based on counsel's erroneous opinion that sentence after trial would likely not exceed sentence offered during plea negotiations, was not ineffective).

[11]North Carolina v. Alford, 400 U.S. 25 (1970).

perpetrators was wearing a blue flannel or blue checkered shirt or jacket. At trial, the State presented a photograph of appellant wearing a blue checkered flannel shirt or jacket to both victims and both arresting officers. Each victim testified that appellant's clothing in the photograph appeared to be the same clothing worn by one of the perpetrators. Each arresting officer testified that appellant's clothing in the photograph appeared to be the same clothing worn by appellant at the time of the arrest. Finally, the record indicates that the testimony of both arresting officers regarding the location of the evidence in the vehicle was consistent at the preliminary hearing and at trial. Thus, appellant failed to demonstrate counsel was ineffective in this regard.

Seventh, appellant contended that his trial counsel rendered ineffective assistance by failing to make a timely objection to "state improper jury instructions." Appellant failed to provide sufficient facts to support this claim.[12] Appellant did not specify which jury instructions he was referring to or explain how they were allegedly erroneous. To the extent that appellant attempted to argue that his counsel was ineffective for failing to object to the State's marginally improper remarks explaining reasonable doubt, we conclude that the issue underlying this claim was substantially addressed on direct appeal and dismissed. The doctrine of law of the case prevents further litigation of this issue.[13] Thus, appellant failed to demonstrate that counsel was ineffective in this regard.

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[12]See Hargrove, 100 Nev. 498, 686 P.2d 222.

[13]See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975) (stating that the law of a direct appeal is the law of the case on all subsequent appeals in which the facts are substantially the same).

Eighth, appellant contended that his trial counsel rendered ineffective assistance by failing to interview family members and present mitigating evidence at sentencing. Specifically, appellant argued that counsel should have interviewed and presented his mother, wife, neighborhood preacher, and "other family members" at sentencing. Appellant failed to provide sufficient facts to support this claim.[14] Appellant failed to demonstrate what specific facts these witnesses would have revealed, and how those facts would have assisted the defense at sentencing. Additionally, appellant failed to indicate what other witnesses or mitigating evidence counsel should have presented at sentencing. Thus, appellant failed to demonstrate that counsel was ineffective in this regard.

Next, appellant raised several claims of ineffective assistance of appellate counsel.[15] "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in Strickland v. Washington, 466 U.S. 668 (1984)." Appellate counsel is not required to raise every non-frivolous issue on appeal.[16] This court has held that appellate counsel will be most effective when every

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[14]See Hargrove, 100 Nev. 498, 686 P.2d 222.

[15]To the extent that appellant raises any of the same issues underlying his claim that his appellate counsel was ineffective as independent constitutional violations, they are waived. Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). We nevertheless address appellant's claims in connection with his contention that appellate counsel rendered ineffective assistance.

[16]Jones v. Barnes, 463 U.S. 745 (1983).

conceivable issue is not raised on appeal.[17] "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."[18]

First, appellant claimed that his appellate counsel was ineffective for failing to thoroughly research and raise the claims that (1) the search of appellant's vehicle violated his rights under the Fourth Amendment to the United States Constitution, (2) the out-of-court identification procedure was impermissible and thus violated his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and (3) the pretrial in-court identification of appellant was impermissible. As addressed previously, we conclude that the search of appellant's vehicle was not improper, the identification procedure was not improper in light of the totality of the circumstances, and the record does not support appellant's claim that the pretrial in-court identification of appellant was impermissible. Therefore, appellant failed to demonstrate that his counsel was ineffective because these issues did not have a reasonable probability of success on appeal.[19]

Second, appellant claimed that his appellate counsel was ineffective for failing to thoroughly research and raise the claim that the State used improper evidence during trial and lost or destroyed evidence. Specifically, appellant contended that (1) police "mishandled" evidence by failing to take any of the clothing he was wearing at the time of arrest into

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[17]Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

[18]Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

[19]See id.

evidence, and (2) the prosecution "made cover-up efforts by presenting a shirt that was not the shirt described by officers and witnesses." These claims lack merit. At trial, the detention center employee that inventoried all of appellant's clothing when he was detained testified that the blue flannel checkered jacket or shirt that appellant was wearing when arrested was returned to appellant when he left. Further, the witnesses at trial were presented with a photograph of appellant wearing the blue flannel checkered jacket or shirt, rather than the article itself, and confirmed that it appeared to be the same clothing that appellant had been wearing at the time of his arrest. Therefore, appellant failed to demonstrate that his counsel was ineffective because this issue did not have a reasonable probability of success on appeal.[20]

Third, appellant claimed that his appellate counsel was ineffective for failing to thoroughly research and adequately raise the claim that the State made improper remarks explaining reasonable doubt during closing argument. We conclude that the district court did not err in denying this claim. As mentioned previously, this claim was substantially raised and rejected on direct appeal. Moreover, this court determined on direct appeal that the errors that appellant complained of were harmless given the substantial evidence of appellant's guilt. Accordingly, this claim is barred by the doctrine of law of the case.[21] Further, appellant cannot avoid this doctrine "by a more detailed and precisely focused argument subsequently made after reflection upon the

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[20]See id.

[21]See Hall, 91 Nev. 314, 535 P.2d 797.

previous proceedings."[22] Thus, we conclude that appellant's counsel was not ineffective in this regard.

Finally, appellant claimed that his sentence was illegal and thus his rights under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution were violated. Specifically, appellant contended that (1) he was subjected to double jeopardy because his offense was a single course of conduct and therefore should have been treated as a single offense, (2) the deadly weapon enhancement prescribed by NRS 193.165 and applied to appellant violates Apprendi v. New Jersey, 530 U.S. 466 (2000) because the jury was not instructed that finding that appellant used a deadly weapon exposed him to an equal term of punishment, (3) NRS 193.165 violates Apprendi by mandating that the sentence for the deadly weapon enhancement run consecutively with the sentence prescribed by statute for the crime, and (4) appellant's sentence is "harsh and excessive" in light of the fact that "no bodily injuries were involved," and appellant had "no substantial criminal history." We conclude appellant waived these claims by failing to raise them in his direct appeal.[23] In an attempt to demonstrate good cause for failing to raise these claims in his direct appeal, appellant argues that Apprendi was decided after his direct appeal was resolved. However, Apprendi is

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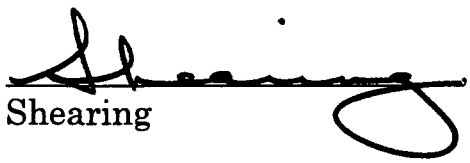
[22]Id. at 316, 535 P.2d at 799.

[23]See Franklin, 110 Nev. at 752, 877 P.2d at 1059 (direct appeal issues, such as a challenge to the sentence imposed, are waived if not pursued on direct appeal) overruled on other grounds by Thomas, 115 Nev. 148, 979 P.2d 222.

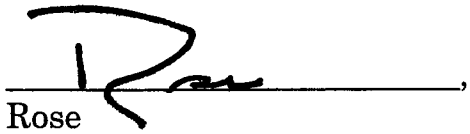
not applicable to the facts of this case.[24] Thus, appellant failed to demonstrate good cause and prejudice for his failing raise these claims in his direct appeal.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.[25] Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Shearing



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cc: Hon. Mark W. Gibbons, District Judge
Attorney General/Carson City
Clark County District Attorney
Alexander D. Pasco
Clark County Clerk

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[24]In Apprendi, the United States Supreme Court held that any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. In the instant case, the question of whether appellant used a deadly weapon in committing each of the charged crimes was submitted to the jury and proved beyond a reasonable doubt.

[25]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).